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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 85

LOCAL 74, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. OF L., AND JACK HENDERSON, INDIVIDUALLY AND AS AGENT FOR LOCAL 74, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. OF L., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 187-196) is reported at 181 F. 2d 126. The findings of fact, conclusions of law and order of the Board (R. 50-61, 11-37) are reported at 80 NLRB 533.

JURISDICTION

The decision of the court below and its decree enforcing the Board's order were entered on April

4, 1950 (R. 186, 187). The petition for a writ of certiorari was granted on December 11, 1950. The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act, as amended, and under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

The Board found that petitioners conducted a secondary boycott against Watson's Specialty Store, in violation of Section 8 (b) (4) (A) of the Labor Management Relations Act, by continuing in effect, after the effective date of the Act, a strike against one Stanley for the purpose of forcing Stanley to cease doing business with Watson. Watson is engaged in commerce within the meaning of the Act, although Stanley is not. The Board ordered petitioners to cease and desist from conducting such secondary boycott against Watson. The questions presented are:

1. Whether the Board's finding that an object of the strike was to force Stanley to cease doing business with Watson is supported by substantial evidence.

2. Whether the Board properly found that petitioners violated Section 8 (b) (4) (A) by continuing in effect, after the effective date of the Act, a secondary boycott initiated prior to the Act's effective date.

3. Whether the Board properly found that the unfair labor practice affected commerce.

4. Whether Section 8 (b) (4) (A) and the Board's order based thereon violate the prohibition against involuntary servitude.

5. Whether completion of Stanley's construction project, at which the strike occurred, renders the Board's order moot and unenforceable.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. III, 141, *et seq.*), are set forth in the Appendix, *infra*, pp. 53-56.

STATEMENT

Upon the usual proceedings under Section 10 of the National Labor Relations Act, as amended, the Board, on November 22, 1948, issued its findings of fact, conclusions of law, and order. The pertinent facts as found by the Board and as shown by the evidence may be summarized as follows:

I. The Board's Findings of Fact

1. *The business of the primary employer; the basic dispute between it and petitioners.*

The Ira A. Watson Company, hereinafter called Watson, is a corporation which maintains and operates a chain of 26 or 27 retail stores located in seven states, including Tennessee (R. 52, 14; 63-64).[1] In about March of 1947, Watson began the

[1] Where, in a series of record references, a semicolon appears, the references preceding the semicolon are to the Board's findings, and those following the semicolon are to the supporting evidence.

operation of "Watson's Specialty Store" in Chattanooga, for the sale of paints and venetian blinds, and the sale and installation of metal and linoleum coverings for walls, and asphalt tile, rubber tile, carpeting, and linoleum for floors (R. 14; 64-65). From March to October 1947, Watson purchased for resale by the specialty store goods valued at approximately $93,000. Approximately 33 percent of these materials were shipped directly to Watson's at Chattanooga from states other than the State of Tennessee; approximately 30 percent were purchased by Watson's from local distributors who had in turn received the goods from sources outside the State of Tennessee; and approximately 35 percent represented stock received from a general store Watson had discontinued operating in Chattanooga, most of which had originated outside Tennessee (R. 14-15; 65-69, 178-179). During the same period, the specialty shop's sales and installation jobs amounted to approximately $100,000, of which about 8 percent represented sales and installations in states other than the State of Tennessee (R. 15; 71-75, 180-181). Watson also ships merchandise from its Chattanooga store to retail outlets of the company located in other states (R. 73-74, 181-182).

Petitioner, Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., hereinafter called Local 74, is a craft union affili-

ated with the United Brotherhood of Carpenters and Joiners of America which in turn is an affiliate of the American Federation of Labor (R. 15; 121). Local 74 admits to membership carpenters and other craftsmen including those who perform work similar to that done by Watson's installation employees. It has jurisdiction over member workmen in Chattanooga and the surrounding area, including portions of the States of Georgia and Alabama (R. 15; 121-122, 125). Petitioner Jack Henderson, during all of the times material herein has been, and is, the business agent of Local 74 (R. 15; 121).

When Watson opened the specialty store, Henderson, as business agent for Local 74, sought unsuccessfully to persuade Watson's installation employees to join the Union (R. 55, 16; 78-79). A few days later, Henderson requested A. D. Smith, the manager of the specialty store, to execute a closed shop contract with Local 74 as the bargaining agent of the installation employees (R. 55, 16; 79). Smith refused to execute the contract and, in the latter part of March, petitioners placed a picket in front of the specialty store during business hours carrying a placard which announced, over the name of Local 74, that Watson employed non-union labor (R. 55, 16; 79).[2] This picketing continued until about August 28, 1947 (R. 16; 80).

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[2] This picketing is in no way involved in petitioners' conduct which the Board found violative of the Act (R. 21-25, 51).

2. *The strike to force or require Stanley to cease doing business with Watson.*

On or about August 7, while the picketing above described continued, George D. Stanley, who had recently purchased a house near Chattanooga, contracted with D. F. Parker to improve and renovate the house (R. 17; 88). Under the terms of the agreement, Parker was to furnish and supervise necessary workmen and to select the material needed for the improvements, while Stanley was to pay the wages of the workmen and the cost of necessary materials, pay a commission of 10 percent of the cost of both to Parker, and turn over to Parker the withholding taxes, social security deductions, and other items deducted from the wages of the workmen (R. 17; 89, 183-184). Pursuant to the terms of this agreement, Parker hired the necessary workmen, including members of Local 74 to do the carpentry work, obtained such material as was needed, and proceeded to renovate and improve the building in accordance with the contract (R. 18; 138).

While the work was in progress, it became necessary to select floor and wall coverings for the bathrooms and kitchen. Neither Parker nor Stanley was able to find the type of covering satisfactory to Stanley at any establishment in Chattanooga except Watson's, and Watson insisted that its own employees, who were non-union, must install any coverings it sold (R. 18; 64-65, 89-90, 92).

Parker and Stanley discussed the complications that might arise with the union employees employed at the Stanley residence if Watson's non-union workmen installed the coverings. At Parker's suggestion, it was agreed that Watson's men should do their work at hours when the union men were off duty (R. 18; 92, 93). Thereupon, Stanley made a special contract with Watson for the purchase and installation of the floor and wall coverings (R. 18; 81, 183).

On Sunday, August 17, while no other workmen were present, Watson's non-union employees began the work of installing the floor and wall covering (R. 18-19; 81-82, 93). They continued the work during regular hours on Monday and Tuesday, in the presence of the union workmen, including the members of Local 74 (R. 19; 82, 111). On Wednesday, August 20, two of the union carpenters stopped work for a about a half hour because of the presence on the job of Watson's non-union employees (R. 19; 112, 144-145). Parker was able to smooth over this difficulty and the carpenters returned to work and finished the day (R. 20; 145). However, on the morning of August 21, when one of Watson's non-union employees, Pozzuto, reported for work, Parker told him that he could not work that day as the union men were threatening to quit and suggested that he complete the installation work at night (R. 19; 116-117). When Pozzuto refused, Parker telephone Watson's

manager, Smith, who directed Pozzuto to leave the building site (R. 19; 82-83, 117).

In the afternoon of the same day (which was one day before Section 8 (b) (4) (A) of the Act became effective), Henderson called at the Stanley residence and ordered the union carpenters, four in number, to "pack up their tools" and stop working on the Stanley residence because Watson's employees were working there (R. 19, 55; 96-97). Stanley arrived at about the same time and sought to persuade Henderson to countermand his order (R. 20; 96). Henderson suggested that Stanley cancel his contract with Watson as a means of getting the union carpenters to return to work (R. 55; 97, 106-107). This, Stanley declined to do. Thereafter, pursuant to Henderson's order, the union carpenters did not return to work on the following day (R. 20, 21; 107). Eventually, however, two of them disregarded the order and, without the knowledge or consent of Local 74, returned and finished the necessary carpentry work by the end of August (R. 20-21; 152-153). The installation of the floor and wall covering was completed by Watson's employees on or about August 28 (R. 20; 83).

The order given by Henderson was not revoked and it has never been rescinded. Henderson gave the order in accordance with a long standing rule of Local 74 not to permit its members to work on a job where non-union workers are employed. He

testified that since Watson's non-union employees were working on the Stanley residence, it would have been a violation of the rules of Local 74 for the carpenters to have returned to that job on August 22 or thereafter. (R. 21; 131-132).

II. The Board's Conclusions

The Board found that Watson was engaged in commerce within the meaning of the Act (R. 51-54), that petitioners had induced employees to engage in a strike at the job on the Stanley residence, an object of which was to force Stanley to cease doing business with Watson (R. 55), that "any widespread application of such pressure by * * * [petitioners] to other customers of Watson, such as can reasonably be anticipated on the basis of this record, could well result in a substantial decrease in Watson's business and in materials purchased from points outside the State of Tennessee" (R. 53), and that, accordingly, petitioners' conduct affected commerce within the meaning of the Act (R. 54). The Board further found that, although the strike was called on August 21, 1947, the day before the effective date of Section 8 (b) (4) (A) of the Act, it was continued on and after August 22, 1947, the effective date of said section of the Act (R. 56-57). The Board concluded therefore, that on and after August 22, 1947, petitioners engaged in conduct in violation of Section 8 (b) (4) (A) of the Act (R. 57).

III. The Board's Order

The Board ordered petitioners to cease and desist from engaging in, or inducing the members of Local 74 to engage in, a strike or concerted refusal in the course of their employment to perform services for any employer, where an object thereof is to require any employer or other person to cease doing business with Watson, and to post the customary notices of compliance (R. 59).

IV. The Decision Below

On April 4, 1950, the court below handed down its opinion (R. 187-196) and entered its decree (R. 199) granting the Board's petition for enforcement of its order (R. 1-3).

The court held that petitioners had engaged in activities proscribed by Section 8 (b) (4) (A) against a concern, Watson, a part of whose business was conducted in interstate commerce and that therefore petitioners' unfair labor practices affected commerce within the meaning of the Act. The court below also held that since the unfair labor practice found by the Board consisted of petitioners' conduct in continuing in effect, after the effective date of the Act, their order to employees to go out on strike, and not in issuing the order before that date, the Act was not being given a retroactive application. The court further held that the Board's order to cease and desist from engaging in conduct violative of Section 8 (b) (4)

(A) was directed against petitioner union and its agents and not against the individual members of the union and therefore did not infringe any constitutional privilege, including the privilege against involuntary servitude. Finally, the court held that the order of the Board had not been rendered moot by reason of the completion of the Stanley residence.

SUMMARY OF ARGUMENT

I

A. The Board properly found that petitioners engaged in secondary strike action in violation of Section 8 (b) (4) (A). The strike was directed against a neutral, Stanley, and an object thereof was to force or require Stanley to cease doing business with Watson, the primary employer. That the strike was undertaken pursuant to petitioner union's rules, and therefore may also have had other objects, does not establish its legality. If *an* object of the strike, not necessarily the sole or principal object, was to force a cessation of business between Watson and Stanley, the strike falls within the prohibition of the Act. Nor is it significant that petitioners' object may have been to force Stanley to discontinue using only Watson's services, and not its products. The Act protects business relationships which involve only the furnishing of services, as much as it protects business relationships which involve only the purchase of goods.

Petitioners' claim that Stanley's business dealings with Watson violated an "all union" contract between Stanley, Parker and the union, and therefore gave rise to a primary dispute between the union and Stanley, is without merit. The record does not establish that Stanley had made any such agreement either with Parker or with the union.

B. The Board's findings and order do not give the Act retroactive application. The Board's findings rest entirely upon petitioners' continuation of the strike, and their failure to rescind the strike order, after the effective date of the Act. The order requires only that it be rescinded. That the strike order may initially have been lawful, because issued prior to the effective date of the Act, did not guarantee that continuation of the order after the effective date of the Act would be lawful.

II

The Board properly found that petitioners' unfair labor practices affect commerce within the meaning of the Act. Secondary boycotts are intended to and do curtail not only the business of the secondary employer but also the business of the primary employer. Thus, if the business of either employer affects interstate commerce the jurisdiction of the Board over the secondary boycott is clear.

It is immaterial that the boycott of a particular secondary employer may not affect the primary

employer's business substantially; for if strikes against those who do business with the primary employer were "multiplied into a general practice" (*Mandeville Island Farms, Inc.*, v. *American Crystal Sugar Co.*, 334 U.S. 219, 236), the effect on the primary employer's business would unquestionably be substantial. Under familiar principles, there need be no showing in "individual cases" of "any specific effect upon interstate commerce." *Mandeville Island Farms case, supra.* Nor is it material that the specific activity immediately affected by the boycott, in these cases building construction, may be "local" in character. In secondary boycott cases particularly, the decisive consideration is not "how local the operation which applies the squeeze" but whether "it is interstate commerce that feels the pinch." *United States* v. *Women's Sportswear Association*, 336 U.S. 460, 464.

In the instant case, as well as in the *Langer* and *Denver* cases, Nos. 108 and 393, this Term, the primary employers were engaged in interstate commerce, and the secondary boycotts which were directed against them were therefore subject to the Board's jurisdiction. The fact that the volume of interstate business done by each of the employers in the *Langer* and *Denver* cases was small is "not enough to remove [them] from the scope of federal regulation where, as here, [their] contribution, taken together with that of many others similarly situated, is far from trivial". *Wickard* v. *Filburn*,

317 U.S. 111, 127-128. The building construction industry is one of those which "though conducted by relatively small units, contribute in the aggregate a vast volume of interstate commerce." *National Labor Relations Board* v. *Fainblatt*, 306 U.S. 601, 607. Congress intended in the Act to extirpate unfair labor practices "so far as its power could reach" (*National Labor Relations Board* v. *Hearst Publications, Inc.*, 332 U.S. 111, 125), and the legislative history clearly shows that Congress specifically intended to subject secondary boycotts in the building construction industry to federal regulation. See 93 Cong. Rec. 4132, 4198, *Leg. Hist.* pp. 1056, 1107).

The circumstance that the Board has declined to exercise jurisdiction in some construction industry cases does not invalidate its exercise of jurisdiction in the instant and companion cases. The action of the Board in declining to exercise jurisdiction in particular cases has been based upon considerations of administrative policy, not of constitutional or statutory power. If the Board has in these cases acted within the scope of its authority, its refusal in other cases to exert that authority to its maximum is without significance.

III

The Act and the order are directed against labor organizations and their agents, not against employees. Labor organizations and their agents are en-

joined from engaging in proscribed secondary strike action. Neither the statute nor the order requires any employees to work, or requires the union to order them to do so. The statute expressly guarantees to individual employees the right to quit work for any or no reason. Therefore, neither Section 8 (b) (4) (A) nor the Board's order based thereon may be said to contravene the constitutional prohibition against involuntary servitude.

IV

The fact that work on the Stanley residence has been completed does not render the Board's order moot. The danger that petitioners might resort to illegal secondary boycotts against Watson in the future suffices, under established principles, to sustain the order.

ARGUMENT

I

THE BOARD PROPERLY FOUND THAT PETITIONERS' STRIKE AGAINST STANLEY WAS DESIGNED TO FORCE OR REQUIRE STANLEY TO CEASE DOING BUSINESS WITH WATSON, AND THEREFORE VIOLATED SECTION 8 (b) (4) (A) OF THE ACT

A. THE BOARD'S FINDING THAT PETITIONERS ENGAGED IN SECONDARY STRIKE ACTION WITHIN THE MEANING OF SECTION 8 (B) (4) (A) IS SUPPORTED BY SUBSTANTIAL EVIDENCE

The record shows clearly (*supra*, pp. 8-9), as the Board found (R. 54-55, 56-58), that petitioners

ordered the union carpenters employed at the Stanley residence to go out and remain on strike. It is also clear from the record, as the Board found (R. 55), that an object of the strike was to force or require Stanley to cease doing business with Watson. As set forth in the Statement (*supra*, pp. 5, 8), petitioner Henderson, in March 1947, solicited Watson's installation employees to join Local 74. When they refused to join, he endeavored to persuade Watson to sign a closed-shop contract although none of Watson's employees was a member of Local 74. Upon Watson's refusal to do so, Local 74 began to picket Watson's store and otherwise publicize the unorganized status of Watson's employees.[3] While the picketing continued, Henderson applied secondary pressure against Watson, by ordering the carpenters employed by Parker to cease working on the Stanley residence because Watson's employees were employed there. At that time, Henderson told Stanley that if he would cancel his contract with Watson, the union carpenters would be permitted to go back to work.

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[3] The Board found that (R. 16, n. 11): "• • • beginning in about July and continuing until well into October 1947, Local 74 ran advertisements in the Labor World (a weekly newspaper owned by the Central Labor Union which was sent to all AFL union members in the Chattanooga area, and a few subscribers, but which was not sold to the general public) naming local firms who employed members of Local 74 for installation work, and stating that Watson's employed non-union labor for this type of work. At the bottom of the advertisement which started in September appeared the statement, 'Do not be deceived by Watson's claim that this statement [sic] is not part of our craft' • • •."

In these circumstances the fact that the strike was called and continued in effect pursuant to petitioner union's rules which prohibit union members from working on a job when non-members are employed (R. 105, 123, 130-131, 134), cannot disguise the fact that *an* object of the strike was to force Stanley to cease doing business with Watson. As we have shown in our Brief in the *Denver* case, No. 393, pp. 43-45, it is immaterial under the statute that the strike may also have had other objects. Petitioners argue, however, that (Br. 34, R. 40-42) since they were at all times willing to permit Stanley to use Watson's materials provided they were installed by members of the Union, it cannot be said that an object of the strike was to force or require Stanley to cease doing business with Watson. This contention overlooks the fact that that portion of the contract between Stanley and Watson which called for installation of the wall coverings constituted as much a part of the "business" between them as that portion which dealt with the furnishing of materials.[4] The "doing business"

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[4] The record affords no support whatever for petitioners' claim (Br. 34-35, 40-41) that Watson's purpose in refusing to sell the materials to Stanley without contracting also for the installation was anti-union. On the contrary, at the time the agreement was made with Stanley, Watson's generally refused to sell material outright, because of the scarcity of materials (R. 84, 85, 86). Indeed, the references to the Union by Smith of Watson's and Stanley, to which petitioners advert (Br. 35, 41), were not even made until Parker had objected to the proposed contract on the ground that the union would strike if it were consummated (R. 139-140).

clause of Section 8 (b) (4) (A) is completely comprehensive; it protects business relationships which involve only the furnishing of services, just as it protects business relationships which involve only the furnishing of goods. A secondary strike to force discontinuance of either type of business relationship is therefore illegal. (See Brief for the National Labor Relations Board in the *Denver* case, No. 393, this Term, pp. 63-64).

There is also no question in the instant case that the strike action was secondary. Parker's employees did not cease work as an incidental consequence of picketing directed solely at Watson's employees. Cf. Brief for the National Labor Relations Board in No. 393, pp. 23-38. Rather, petitioners conducted a strike among Parker's employees, thereby exerting pressure against Parker, a neutral employer, as well as against Stanley, also a neutral, in direct contravention of Section 8 (b) (4) (A).

Petitioners insist, however, throughout their brief (p. 10, *et passim*), that the strike resulted from a primary dispute between them and Stanley and that, for this reason, the strike was not secondary. This dispute, according to petitioners, arose from Stanley's breach of an alleged agreement with Parker, the contractor, that the job was to be "an exclusively union job." Petitioners refer to this alleged agreement as a "cost plus union contract" (Br. 2), and later in their brief (pp. 30, 29), assert that the all-union provision was "a collective bargain * * * an act and result of collective bargain-

ing." Petitioners also assert (Br. 44) that the all-union provision "had been originally agreed to by Stanley, Parker, and the Union." Even assuming, *arguendo*, that the agreement between Parker and Stanley contemplated the employment of only union men, the record contains no support whatever for the claim that the Union was, in any sense, a party to such agreement, or that the agreement was, in any sense, a "collective bargaining" contract. Petitioners do not document these assertions by even a single reference to the record. But even more significant is the fact that the record affords no warrant for petitioners' claim that there was an agreement between Stanley and Parker which required the employment of union men only on the project.[5] Petitioners rest their position entirely upon a truncated excerpt from Stanley's testimony, which omits the critical qualification which Stanley added. Stanley testified that in remonstrating with petitioner Henderson, he declared (R. 96):

> I put up as good a plea as I could to show why I needed to get in the house, and told them I wanted Union men and had always enjoyed having Union men working, preferred them because I thought their work was better, and that Parker—it was my understanding with

[5] This contention is an obvious afterthought. No such contention was advanced by petitioners in their numerous exceptions to the Intermediate Report, which detailed, *inter alia*, nine factual findings which the Trial Examiner allegedly erred by failing to make (R. 42-43). Compare Section 10(e) of the Act.

> Parker that Union men were going to do the work, *and that I certainly didn't mind having Union men do it if I could possibly find material for my floor covering and walls* [i.e., suitable material which the seller would not insist on installing himself].

Throughout petitioners' brief the comma which appears after the word "work" in the foregoing quotation is replaced by a period, and the succeeding portion, which we have italicized, is entirely omitted. Clearly, the foregoing testimony, as it appears in the record, will not support the claim that Stanley had agreed with Parker that, whatever circumstances might develop, the job was to be all union. On the contrary, the testimony shows that if Stanley could not obtain suitable floor and wall coverings from union sources, as later proved to be the case, he would be free to use non-union sources. This is confirmed by the fact that when it appeared that Stanley could not obtain suitable wall coverings except at Watson's, Parker himself suggested that Stanley have Watson's men perform their work when Parker's employees were not on the job, and thereby possibly avoid a strike by Parker's employees (R. 92, 142, 183-184). Parker was present when Watson's men came on the job and "helped get them started" (R. 91, 99, 111). Accordingly, the Board found (R. 18, 19, 32, 51), consistent with Stanley's testimony (R. 99), that the agreement between Stanley and Watson was made "with Parker's implied consent" and performed "with Parker's approval." Nothing in the testi-

mony of Henderson or Parker, or in the written agreement between Stanley and Parker, lends support to petitioners' position. The written agreement makes no provision for the exclusive employment of union men; neither Parker nor Henderson claimed that there was a supplementary agreement of this character. Indeed, Henderson, testifying to his conversation with Stanley, merely reported (R. 128) that the latter had stated to him that "he had a brother that was a member of a union; he was in sympathy with the Union." And Parker testified that the nub of his "controversy" with Stanley was that his union men, presumably because of their union rule, would not work with Watson's non-union workmen (R. 142-143).

Petitioners also urge (Br. 26-28) that the proviso to Section 8 (b) (4) immunizes the strike against the prohibition of Section 8 (b) (4) (A).[6] But the proviso on its face protects only refusals of employees to render services to employers *other* than their own, and hence can have no application here where the employees refused to render services to their own employer.

B. THE BOARD PROPERLY FOUND THAT BY CONTINUING THE STRIKE AFTER THE EFFECTIVE DATE OF THE ACT PETITIONERS VIOLATED SECTION 8 (B) (4) (A)

Petitioner instituted the strike among Parker's employees on August 21, 1947, the day before Section 8 (b) (4) (A) became effective, by ordering

[6] The proviso is discussed in our brief in *International Rice Milling Co.*, No. 313, this Term, pp. 66-81.

Parker's employees to cease work. The record shows, and the Board found (*supra*, pp. 8-9), that this strike order was neither rescinded nor revoked after the effective date of the Act. Indeed, petitioners admit that the strike order remained fully operative after that date. Had Parker's employees openly returned to work after the effective date of the Act they would have been violating the rules of the Union which, after that date, as before, prohibit union members from working on a job where non-union men are employed.

Since the strike order was issued prior to the effective date of Section 8 (b) (4) (A), the Board did not find that petitioners' conduct in issuing the order violated the Act. The Board found that petitioners violated the Act only by continuing the secondary strike after the effective date of the Act. And, as we have shown, the evidence abundantly supports the Board's finding that petitioners did continue the strike after August 22, 1947.

Petitioners contend, however (Br. 43-46), that since the strike resulted from an order issued prior to the effective date of the Act, and occurred pursuant to union rules adopted before that date, the Board's order gives to the Act retroactive application in contravention of Section 102 thereof.[7]

[7] Section 102 provides in pertinent part that "No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice thereto, * * *."

But the Board did not find that petitioners' action in calling the strike on August 21, was unlawful, nor did it hold unlawful petitioners' application, prior to August 22, of the union rule. The Board's finding rests entirely upon petitioners' failure, after the effective date of the Act, to rescind the strike order, and upon their continued application of the rule as a means of exerting secondary pressure of the kind condemned by the statute. That a particular course of conduct is lawful when initiated does not perpetually guarantee its continued legality. Once acts or omissions are made unlawful by statute, the outlawed conduct, though previously lawful, must cease. Obviously, persistence in conduct after it has been made unlawful is illegal; to find it such is to give prospective, not retroactive application to the statute. *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board*, 91 F. 2d 134 (C. A. 4), certiorari denied, 302 U. S. 731; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 342; *Waters-Pierce Oil Co.* v. *Texas (No. 1)*, 212 U. S. 86, 107-108.

II

THE BOARD'S FINDING THAT PETITIONERS' UNFAIR LABOR PRACTICES AFFECT COMMERCE WITHIN THE MEANING OF THE ACT IS VALID

Section 10 (a) of the Act empowers the Board to prevent the commission of unfair labor practices which affect commerce. Section 2 (7) of the Act defines the term "affecting commerce" to

mean "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." Congress in the Act thus "left it to the Board to ascertain whether proscribed practices would in particular situations adversely affect commerce when judged by the full reach of the constitutional power of Congress." *Polish National Alliance* v. *National Labor Relations Board*, 322 U. S. 643, 648.

This Court, in a series of cases, has laid down the controlling principles which govern the Board's jurisdiction. It has long been established that the applicability of the Act turns on whether a stoppage of business operations resulting from industrial strife attributable to unfair labor practices might tend to impede or disrupt the free flow of goods in their normal channels in interstate commerce. *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1, 41-42.

De minimis aside, application of the Act does not depend upon the volume of commerce which might be affected by such stoppage. "The language of the National Labor Relations Act seems to make it plain that Congress has set no restriction upon the jurisdiction of the Board to be determined or fixed exclusively by reference to the

volume of interstate commerce involved. * * * Given the other needful conditions, commerce may be affected in the same manner and to the same extent in proportion to its volume, whether it be great or small. Examining the Act in the light of its purpose and of the circumstances in which it must be applied we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which the courts would apply the maxim *de minimis.*" *National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601, 606-607. Accord: *Santa Cruz Packing Co.* v. *National Labor Relations Board,* 303 U. S. 453, 467.

The regulatory scheme of the Act extends to enterprises, no matter how "local" their activities may be, if interruption or cessation of those activities would adversely affect interstate commerce. "Congress in order to protect interstate commerce from adverse effects of labor disputes has undertaken to regulate all conduct having such consequences that constitutionally it can regulate. * * * Congress has explicitly regulated not merely transactions or goods in interstate commerce but activities which in isolation might be deemed to be merely local but in the interlacings of business across state lines adversely affect such commerce." *Polish National Alliance* v. *National Labor Relations Board,* 322 U. S. 643, 647-648.

Finally, exemption from the applicability of the Act may not be obtained by focusing attention exclusively upon the effects of the single practice involved in the particular case. "Whether or no practices may be deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce." *Polish National Alliance* case, *supra*, p. 648; cf. *Wickard* v. *Filburn*, 317 U. S. 111, 128.

These basic principles, which are applicable not only to the National Labor Relations Act but also to other statutes, like the Sherman Act, have recently been reiterated by this Court. In *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, the Court said (pp. 234, 236):

> * * * the inquiry whether the restraint occurs in one phase or another, interstate or intrastate, of the total economic process is now merely a preliminary step, except for those situations in which no aspect of or substantial effect upon interstate commerce can be found in the sum of the facts presented. For, given a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual or threatened effect upon interstate com-

> merce, the vital question becomes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence.
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> Congress' power to keep the interstate market free of goods produced under conditions inimical to the general welfare * * * may be exercised in individual cases without showing any specific effect upon interstate commerce, *United States* v. *Walsh*, 331 U. S. 432, 437-438; it is enough that the individual activity when multiplied into a general practice is subject to federal control, *Wickard* v. *Filburn, supra* [317 U. S. 111], or that it contains a threat to the interstate economy that requires preventive regulation. *Consolidated Edison Co.* v. *Labor Board*, 305 U. S. 197, 221-222.

In *United States* v. *Women's Sportswear Association*, 336 U. S. 460, 464, the Court said:

> The source of the restraint may be intrastate * * *; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.

The unfair labor practice with which we are here concerned is the secondary boycott, effectuated through strikes and work stoppages among

employees of secondary employers. The effects of that practice on interstate comerce provide the touchstone of its amenability to Congressional regulation. Inherently, the secondary boycott is intended to and does curtail not only the business of the secondary employer, but also the business of the primary employer, who is the union's ultimate target. Hence, if either the secondary or the primary employer is engaged in operations which affect interstate commerce, practices like secondary boycotts which tend to curtail those operations are within reach of the federal Act.

In the instant case it is Watson, the primary employer, who, as the Board found (R. 52) without challenge by petitioner, is engaged in interstate commerce. Watson is a large chain store operator who does business in several states.[8] The specialty store immediately involved in the instant case purchases and sells substantial quantities of supplies and goods across state lines. The secondary boycott initiated by petitioners against Watson manifestly presented a threat to the substantial interstate operations of the specialty store.

It is immaterial, of course, that the specific activities before the Board, *i.e.*, the secondary strike at the Stanley residence, might not, of itself, exert a substantial adverse affect upon Watson's business, for there need be no showing in "in-

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[8] The record does not disclose the extent of the interstate operations of Watson's entire chain system.

dividual cases" of "any specific effect upon interstate commerce." *Mandeville Farms* case, *supra; Polish National Alliance* case, *supra; Wickard* v. *Filburn*, 317 U. S. 111, 128. It is sufficient that if secondary strikes against customers of Watson were "multiplied into a general practice," Watson's interstate business would be adversely affected. *Ibid.* The Board expressly found in the instant case that proliferation of secondary strike pressure against other customers of Watson may reasonably be anticipated (R. 53). The threat to Watson's interstate operations thus presented by petitioners' activities fully meets the established test of the Act's coverage.[9]

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[9] The circuit courts of appeals in situations comparable to the instant case have uniformly upheld the Board's jurisdiction. *United Brotherhood of Carpenters and Joiners of America* v. *Sperry*, 170 F. 2d 863 (C. A. 10); *National Labor Relations Board* v. *United Brotherhood of Carpenters and Joiners of America*, 184 F. 2d 60 (C. A. 10), pending on petition for certiorari, No. 387, this Term; *Slater* v. *Denver Building & Construction Trades Council*, 175 F. 2d 608 (C. A. 10); *International Brotherhood of Electrical Workers, Local 501* v. *National Labor Relations Board*, 181 F. 2d 34 (C. A. 2), certiorari granted, No. 108, this Term; *National Labor Relations Board* v. *Denver Building and Construction Trades Council*, — F. 2d — (C. A. D. C.), certiorari granted, No. 393, this Term; *Shore* v. *Building & Construction Trades Council*, 173 F. 2d 678 (C. A. 3). The decision of the Court of Appeals for the Tenth Circuit in *Groneman* v. *International Brotherhood of Electrical Workers*, 177 F. 2d 995, does not represent a departure from the principles discussed above. There, the union, in order to compel one Engle, a non-union sub-contractor working on a schoolhouse, to employ union electricians, picketed the construction site. As a result of the picketing the union employees of Groneman who were performing the carpentry work on the project stopped working. Groneman had caused to be shipped to the site $6000 worth of materials in interstate commerce. Groneman brought action against

It will not do, as the court below aptly stated, to view the controversy as if it were merely one between petitioners and the secondary employer, Stanley, whose operations were entirely local, for such a view ignores the Board's finding that the secondary boycott was directed against Watson, a concern which was engaged in interstate commerce. The National Labor Relations Act, like the Sherman Act, "is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Farms* v. *Sugar Co.*, 334 U. S. 219, 236. "The injury, and hence the power, does not depend upon the fortuitous circumstance that the particular person conducting the intrastate activities is, or is not, also engaged in interstate commerce." *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 121. In secondary boycott cases particularly, the critical consideration is not "how local the operation which applies the squeeze," but whether "it is interstate commerce that feels the pinch," *United States* v. *Women's Sportswear Association, supra; Local 167* v. *United States*, 291 U. S. 293, 297. That petitioners intended Watson's

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the union under Section 303 of the Act which provides for private suits for damages arising from secondary boycotts as defined therein. The Court of Appeals dismissed the action for the reason that the effect of the union activities on commerce was *de minimis*. The alleged secondary boycott was not directed against Groneman and it affected the latter's operations merely incidentally in the one instance; hence the union's action, unlike the action of petitioners against Watson, presented no general threat against the continuing interstate operations of Groneman.

to feel the pinch and that their unlawful conduct therefore "contains a threat to the interstate economy that requires preventing regulation" (*Mandeville* case, *supra*), is thus beyond question.

The foregoing analysis also serves to demonstrate the validity of the Board's exercise of jurisdiction in the *Langer* case, No. 108, this Term, and in the *Denver* case, No. 393, this Term. In the *Langer* case (See Brief for the National Labor Relations Board, in No. 108, This Term, pp. 5-6), Langer, the primary employer was engaged in interstate commerce within the meaning of the Act. In the course of his business, Langer purchased quantities of materials from states other than New York where his business establishment was located. In addition, Langer performed work in Connecticut and in connection therewith transported in interstate commerce quantities of material and supplies. Although the materials purchased by Langer or transported by him in interstate commerce were not large in volume, it cannot be said that they fall into a *de minimis* classification. Secondary strikes among contractors who do business with Langer would therefore cripple interstate operations which are protected by the Act. Moreover, the construction project which was the immediate subject matter of the controversy in that case was itself interstate in character, being performed by New York con-

tractors, including Langer, at a Connecticut site.[10]

In the *Denver* case (See Brief for the National Labor Relations Board in No. 393, this Term, pp. 4-5), the primary employer, Gould & Preisner, also purchased and caused to be transported in interstate commerce, substantial quantities of materials. During the year immediately preceding the commission of the unfair labor practices found by the Board, the firm purchased raw materials valued at $86,500, of which 65 percent was purchased and shipped directly from more than forty firms located outside the State of Colorado where Gould & Preisner was engaged in business.

In the *Langer* and *Denver* cases, as in the instant case, the secondary boycotts were intended to affect the business of the primary employers as well as the secondary employers. In all of these cases, if secondary strike pressures were exerted against

[10] In the *Langer* case, two of the three Board members who concurred in holding that the Union had violated Section 8 (b) (4) (A) were of the view that the Board was warranted in asserting jurisdiction on the basis of the threatened effect on Langer's interstate operations. (R. 296); the third member of the majority was of the opinion that the Board had jurisdiction in the case because the very controversy before the Board arose out of an interstate transaction, in which New York contractors were engaged in the construction of a residence in Connecticut (*id.*). The two members constituting the minority thought that the Board should not, as a matter of discretion, assert its jurisdiction in the case because the "operations involved * * * constitute an essentially local enterprise * * *." (R. 299.)

The Court of Appeals for the Second Circuit was of the opinion that Langer's interstate operations alone sufficed to support the Board's jurisdiction. In addition, that court also pointed out that Langer performed substantial amounts of work for various enterprises whose own interstate activities were substantial. (R. 325-326.)

all or any substantial number of concerns who do business with the primary employer their business would be sharply curtailed, if not destroyed. And, in the *Langer* and *Denver* cases, no less than in the instant case, the danger of such multiplication of secondary strike pressures is very real."

The fact that in all of these cases both the primary and the secondary employers were engaged in the building construction industry, an industry which the unions regard as "local" does not suffice to put the secondary boycotts "beyond reach of Congress' authority or of the statute." *Mande-*

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[11] The record in the *Langer* case (R. 109-110) discloses that the union threatened to picket a construction site of the Middletown Recreation Center, Inc., if the latter engaged Langer to perform the electrical work. Although the Board found this threat not to be violative of the ban against inducement of employees to engage in strike action prohibited by Section 8 (b) (4) (A), since it was addressed to an official of that company, and therefore not to an employee within the meaning of that Section (R. 260, 263-265, 298-299), "the incident serves to underscore the threat implicit in the union's action against all of Langer's operations.

In the *Denver* case the record discloses (R. 139-144) that the Council and two of its affiliates, the Electricians and the Carpenters, approached another contractor on a different project than the Bannock Street building, where Gould & Preisner also had a subcontract for some electrical work. After representatives of the three organizations voiced dissatisfaction over the presence of Gould & Preisner on the project, the Carpenters ordered one of its members off the job. The Board dismissed the complaint insofar as it alleged that this action was violative of Section 8 (b) (4) (A) on the ground that (R. 259-260) the withdrawal of the services of a single employee did not constitute strike action within the meaning of that Section. The incident nevertheless illustrates the likelihood of the union's extending the boycott to other concerns engaging the services of Gould & Preisner and the threat implicit therein against the continued movement of material to that firm in interstate commerce.

ville Farms v. *Sugar Co.*, 334 U. S. 219, 229. Certainly, the activities of these employers are no more local than was the growing of sugar beets involved in the *Mandeville* case, the consumption of home-grown wheat involved in the *Wickard* case, the sale of drugs by a retail druggist involved in *United States* v. *Sullivan*, 332 U. S. 689, and the stitching of unfinished garments by stitching contractors involved in *United States* v. *Women's Sportswear Ass'n.*, 336 U. S. 460. As was true of the activities involved in the *Mandeville* and *Wickard* cases, the impact of the building construction industry upon interstate commerce is undeniably huge.[12] It is that impact, not the character of the activities themselves, which is controlling.[13] *Wickard* v.

[12] In 1946, the total value of new construction activities in the United States was in excess of ten billion dollars. Indicative of the interstate movement of goods and materials that occurs in connection with the industry's operations is the fact that in that year six states accounted for 67% of the copper production of the country but accounted for only 33% of construction activity; six states accounted for 66% of the lead production of the country but only 34% of construction activity; thirteen states accounted for 64.4% of the lumber production but for only 25.6 of the Construction Activities. These statistics appear at pp. 215, 217-219, 223 of the record in the *Langer* case and are compiled and computed from U. S. Dept. of Commerce, Bureau of Foreign and Domestic Commerce, Construction Division, *Dollar Construction Estimates, 1915-1946*, p. 36. Also of significance is the fact that in 1939, of the total construction work in that year, 15.2% ($688,659,000) was performed by contractors outside their home states. *Langer* record, p. 221.

[13] Petitioners' reliance (Br. 51-54) upon early cases construing the Sherman Act and other legislation which stress the character of the activities involved rather than the impact of those activities on interstate commerce is misplaced. Petitioners' argument "is a reversion to conceptions formerly held but no longer effective to restrict either Congress' power

Filburn, 317 U. S. 111, 123; *Mandeville Farms* v. *Sugar Co.*, 334 U. S. 219, 229-235.

Nor does the fact that the business of each of the building contractors is small, and thus, if taken alone, may be said to affect interstate commerce but slightly, bar the power of Congress or the application of the statute. "That appellee's own contribution * * * may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." *Wickard* v. *Filburn*, 317 U. S. 111, 127-128; cf. *United States* v. *Darby*, 312 U. S. 100, 123; *Mabee* v. *White Plains Publishing Co.*, 327 U. S. 178, 183.

The building construction industry is in large part composed of small units like Langer and Gould & Preisner.[14] The record in the *Langer* case illu-

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Wickard v. *Filburn*, 317 U. S. 111, or the scope of the Sherman Act's coverage," *Mandeville Farms* v. *Sugar Co.*, 334 U. S. 219, 229.

[14] In 1939, the latest date for which statistics are available, the total number of establishments in the construction industry was 215,050. Of this number, 87.2% did less than $25,000 worth of work. The total number of special trade contractors (*i.e.*, contractors who contract for and are primarily engaged in a specialized trade such as plumbing, painting, carpentry, etc.) was 162,067. Of this number, 75.4% were doing less than $25,000 worth of business. The total value of construction work performed by this group of special trade contractors amounted to $829,680,000, or 18.4% of the total value of work performed in the construction industry. This data which appears at p. 220 of the record in the *Langer* case, is compiled and computed from U. S. Department of Commerce, Bureau of the Census, Census of Business, 1939, Volume IV, *Construction*, 1939, 1943, pp. 6, 12, and 17.

trates how closely the operations of such contractors are intertwined with the movement of large masses of goods across state lines. See Brief for the National Labor Relations Board in No. 108, this Term, pp. 4-6. Langer himself, as well as Giorgi and Deltorto who were also engaged in the construction of the Greenwich house, purchased substantial quantities of materials from concerns engaged directly in interstate commerce. Those concerns in turn purchased large quantities of materials which were shipped from other states and resold these materials to numerous customers such as Langer. Hence, as the Trial Examiner pointed out in that case (R. 252-253), although the value of materials used in any particular project, such as the Greenwich house, may not be large, the construction of such a project is "embedded in a network of commercial relationships" involving contractors like Langer, Giorgi and Deltorto, and their respective suppliers, "which relationships, in their ramifications * * * manifestly affect commerce * * *." Moreover, builders, like Langer, often do construction work for firms engaged directly in interstate commerce. (Brief for the National Labor Relations Board in No. 108, p. 6.) Manifestly, if secondary boycotts against firms like Langer, Gould & Preisner, etc., could be effectuated through strikes against their suppliers, customers and others who do business with them, a huge

volume of interstate commerce would suffer. The building construction industry is thus one of the industries to which this Court's observations in the *Fainblatt* case, 306 U. S., at pp. 607-608, are clearly applicable:

> There are not a few industries in the United States which, though conducted by relatively small units, contribute in the aggregate a vast volume of interstate commerce. Some * * * are extensively unionized and have had a long and tragic history of industrial strife. It is not to be supposed that Congress, in its attempted nationwide regulation of interstate commerce through the removal of the causes of industrial strife affecting it, intended to exclude such industries from the sweep of the Act.

The legislative history shows beyond question that Congress did not intend to exclude the building construction industry from the sweep of the secondary boycott provisions of the Act. One of the express purposes of the Congressional sponsors of the legislation was to rid the building trades of the bane of secondary boycotts and jurisdictional strikes. The case most often referred to in the course of debate as the classic example of a secondary boycott which the Act was designed to render unlawful was *Allen Bradley Co.* v. *Local Union No. 3, I. B. E. W.*, 325 U. S. 797, a building con-

struction industry case.[15] Another case which was discussed as illustrative of the abuses which the Act was intended to reach was the refusal of AFL unions to install neon signs because the signs bore the label of the CIO (93 Cong. Rec. 4132, Leg. Hist. p. 1056). In discussing the jurisdictional strike provisions of the Act sponsors of the legislation emphasized that the jurisdictional strike was prevalent "particularly in the building trades" and that the disputes affected the use of steel "in the building of homes and offices" (*ibid.*). In view of Congress' observation that potentially the secondary boycott can create "a chain reaction that will tie up the entire United States in a series of sympathetic strikes" (93 Cong. Rec. 4198, Leg. Hist. p. 1107), it is idle to argue that Congress was oblivious to and unconcerned with the consequences of secondary boycotts in the building construction industry upon the national economy.[16]

[15] See, *e.g.*, S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 22; 93 Cong. Rec. 4132, 4199, 5011, reprinted in *Legislative History of the Labor Management Relations Act, 1947* (Gov't. Print. Off., 1948), pp. 428, 1056, 1107, 1491.

[16] Petitioners' assertion (Br. 50-51) that the Act was not intended to have application to "local" construction jobs or to a "local building union performing a local job" is based upon the statement of Senator Taft appearing in the *New York Journal-American* of July 7, 1947, that "the construction industry ordinarily would be intrastate commerce and would not be affected by the Act" and other statement by Senator Taft in *Collier's Magazine* of March 6, 1948, that he did not believe that Congress intended the ban against the closed shop contained in the Act to "extend to local building-trade unions whose work is, in fact, intrastate in character." Petitioners also rely (Br. 65) on the report of a legislative subcommittee issued after the passage of the Act dealing with the interpreta-

The views expressed by the Court of Appeals for the Third Circuit in *Shore* v. *Building and Construction Trades Council*, 173 F. 2d 678, at p. 681, summarize our position:

> All of this argument adds up to the conclusion that what affects the building industry in a given community affects interstate commerce and that the total effect of a $10,000,000,000 industry on interstate commerce is obviously very appreciable. One small stoppage may not have an immediately perceptible effect upon the flow of the whole stream. But many small stoppages will have such effect. And like the small amount of grain in *Wickard* v. *Filburn*, [317 U. S. 111], the power to regulate is not lost because of the small size of any individual contribution. We reach the conclusion that it cannot be denied that Congress may, through its power to regulate what affects interstate commerce, regulate labor practices in industries which are themselves dependent on interstate commerce. That Congress has done so in the Act regulating labor relations is established. There is no escape, therefore, from the answer that the power is there and Congress has chosen to exercise it.

In the light of all these considerations we submit that in asserting jurisdiction in the *Denver*

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tion, by the Board's General Counsel, of the term "affecting commerce." These relatively ambiguous statements were made after the Act was passed and form no part of its legislative history. Since, as petitioners' construe them, they are inconsistent with the understanding entertained by Congress at the time the Act was passed, they cannot establish that Congress did not reach secondary boycotts in the building trades.

case and the *Langer* case, no less than in the instant case, the Board acted within the scope of the authority delegated to it by Congress.

Cases arising under the Fair Labor Standards Act have no relevance here. In that statute Congress did not exert the full reach of its commerce power and plainly indicated its intention to exclude from the coverage of that statute "essentially local activities." Because of this express limitation, this Court has declined to bring within the scope of the statute and *"absorb by adjudication* essentially local activities that Congress did not see fit to take over by legislation." (Italics supplied.) *10 East 40th St. Co.* v. *Callus*, 325 U. S. 578, 582-583.

In the National Labor Relations Act, unlike the Fair Labor Standards Act, Congress manifested a purpose to regulate labor practices not only in firms which are engaged "in commerce" but also in those whose activities "affect commerce." In so defining the regulatory scope of the Act, Congress was not "indulging stylistic preferences" but manifesting its intention to exercise its plenary power over commerce and to regulate all activities which "in the interlacings of business across state lines adversely affect such commerce." *Polish National Alliance* v. *National Labor Relations Board*, 322 U. S. 643, 647-648.

The fact that Congress has chosen to regulate certain practices in the building construction in-

dustry which adversely affect interstate commerce does not mean that the line between matters of local and matters of national concern has been obliterated. That secondary boycotts in the building construction industry have impact on the movement of goods across state lines has been demonstrated, pp. 27-37, *supra*. As this Court has observed (*Polish National Alliance* case, *supra*, at pp. 650-651):

> * * * the old admonition never becomes stale that this Court is concerned with the bounds of legal power and not with the bounds of wisdom in its exercise by Congress. When the conduct of an enterprise affects commerce among the States is a matter of practical judgment, not to be determined by abstract notions. The exercise of this practical judgment the Constitution entrusts primarily and very largely to the Congress, subject to the latter's control by the electorate. Great power was thus given to the Congress: the power of legislation and thereby the power of passing judgment upon the needs of a complex society. Strictly confined though far-reaching power was given to this Court: that of determining whether the Congress has exceeded limits allowable in reason for the judgment which it has exercised. To hold that Congress could not deem the activities here in question to affect what men of practical affairs would call commerce, and to deem them related to such commerce merely by gossamer threads and not

by solid ties, would be to disrespect the judgment that is open to men who have the constitutional power and responsibility to legislate for the Nation.

Petitioners assert (Br. 61-64), however, that the Board in a series of decisions issued after its decisions and orders in the instant case and in No. 108, this Term, were handed down, has in effect tacitly recognized that it exceeded the scope of its authority in asserting jurisdiction in these construction industry cases. There is no foundation for this assertion. The Board has, it is true, declined to assert jurisdiction in several cases arising in the construction industry. But there is no suggestion in any of them that the Board was of the view that it could not, if it chose, have asserted jurisdiction there. On the contrary, the Board made it clear that its decision not to exercise jurisdiction in the particular cases there involved was based upon considerations of discretion, not of power. The Board's judgment did not turn upon whether Federal power under the commerce clause could be asserted in those cases, but only on whether the Board should, in the exercise of its administrative discretion to effectuate the policies of the Act, exercise this power.[17] The Board declined to exercise its jurisdiction in those cases, not because the affected employer's operations were so

[17] See *Building and Construction Trades Council and George Petredis and William S. Fryer*, 85 NLRB 241; *Walter J. Mentzer*, 82 NLRB 389.

unrelated to commerce as to preclude the Board's assertion of jurisdiction, but because the impact on commerce in the circumstances there disclosed was relatively slight and, on balance, did not seem to the Board to warrant exercise of its jurisdiction over the dispute. Summarizing its views the Board said (*Denver Building and Construction Trades Council*, 90 NLRB, No. 66):

> From the outset we have recognized and given effect to the legislative intent to proscribe certain unfair labor practices by labor organizations in [the building and construction] industry. In so doing, however, we did not then nor do we now regard Congress as having ordered this Board, in the building and construction industry, to cease to exercise a function inherent in the administrative process, i.e., to temper power with policy considerations in appropriate circumstances. Indeed, in the very cases cited by the dissent as the highwater mark of Board consistency with legislative intent, far from enunciating a rule of blanket jurisdiction, we set forth that it would accord with the intent of Congress and effectuate the policies of the amended Act to assert jurisdiction over cases involving the local construction industry, "*where interference therewith would have a substantial effect on interstate commerce*" (underscoring supplied).
>
> Consistent with this test, we have invoked our administrative discretion in this and related industries on a case to case basis, as-

serting jurisdiction where the facts pointed to a direct and substantial effect on commerce, though the operations involved were, in isolation, intrastate;[8] and declining to assert jurisdiction where the facts pointed to a remote and insubstantial effect on commerce.[9] Similarly, when confronted with essentially small or characteristically local enterprises, whatever the industry, the Board has refrained

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[8] *International Brotherhood of Electrical Workers, Local 501, A. F. of L. (Samuel Langer)*, 82 NLRB 1028, involving a small residence but with direct inflow of materials and contractors operating in more than one State; *Denver Building and Construction Trades Council, et al. (Earl C. Gould and John C. Preisner d/b/a Gould & Preisner)*, 82 NLRB 1195, involving small projects as to which the charging party's operations were slight, but the charging party's business in general depended upon a substantial direct inflow of materials; *Denver Building and Construction Trades Council, et al. (The Grauman Company)*, 87 NLRB, No. 36, involving the installation of a soda fountain in a local store, but directly affecting the operations in general of the charging party, itself in interstate commerce.

[9] *Building and Construction Trades Council of Pittsburgh, Pennsylvania, A. F. of L., et al. (George Petredis and William S. Fryer), supra*, involving a local theatre as to which the materials used by the contractors were purchased locally though originating in part outside the State with one insubstantial exception, and the charging party's business was relatively small; *Walter J. Mentzer, supra*, involving an apartment house as to which the materials used were purchased locally, though originating in part outside the State, and the charging party's business was relatively small; *Row Construction Company, supra*, involving small municipal buildings as to which the materials used were purchased locally, though originating in part outside the State, and the charging party's business was relatively small; *Denver Building and Construction Trades Council (B. W. Fellers, Inc.), supra*, involving a local contractor engaged principally in residential construction as to which virtually all the materials used were purchased locally, though originating in part outside the State.

> from asserting the Federal power where to do so, in its opinion, would exceed the bounds of wisdom and fail to effectuate the policies of the Act. [Some footnotes omitted]

Petitioners in the *Langer* case, No. 108, argue (Br. pp. 28, 31), that "it is difficult to distinguish the type of differences in practical judgment which are available to draw a line between rulings of law and administrative judgments that commerce is affected in too remote a sense to warrant the exercise of jurisdiction," and that therefore the Board's refusal to exert jurisdiction "requires the conclusion that the Congress did not intend to cover labor disputes of the local character here involved." But the differences, and their consequences, are very real. In a statute like this one, where Congress intended to extirpate unfair labor practices "so far as its power could reach" (*National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 125), a practical judgment that particular relationships are not to be regulated under the Act would, on petitioners' view, automatically remove such relationships from the area of federal power. The Board's practical judgment that although Congress authorized the Board to exercise jurisdiction it should refrain from doing so, has no such stultifying consequences insofar as the existence of federal power is concerned. Consequently, the Board is free to and does[18] make its

[18] See *Denver Building and Construction Trades Council*, 90 NLRB, No. 66.

policy judgements turn upon budgetary and staff considerations, factors which can play no part in a court's judgment as to the permissible reach of federal power. These considerations are inherently of a fluctuating nature and permit adaptation of the reach of the statute to the realities of both economic needs and administrative capacity.

The issue before this Court is whether the Board, in asserting jurisdiction in the instant and companion cases, has exceeded its authority under the statute or has acted within the permissible limits of that authority. In the light of the controlling principles laid down by this Court, that issue must, we believe, be resolved in favor of the Board. That the Board may have declined to exercise jurisdiction in other cases does not mean that the Board had no authority to assert jurisdiction here. Power is not extinguished by mere failure to exercise it. *United States* v. *American Union Transport*, 327 U. S. 437, 454-455; *United States* v. *Morton Salt Co.*, 338 U. S. 632, 647-648; *National Labor Relations Board* v. *Townsend*, 185 F. 2d 378, 383 (C. A. 9). Nor does lack of consistency, if any, in its policy judgments invalidate the Board's exercise of jurisdiction in the instant and companion cases. Cf. *Virginian Railway* v. *United States*, 272 U. S. 658, 665-666; *Georgia Public Service Commission* v. *United States*, 283 U. S. 765, 775; *Securities and Exchange Commission* v. *Chenery Corporation, et al.*, 322 U. S. 194, 201-203; *Packard Motor Car Co.*

v. *National Labor Relations Board*, 330 U. S. 485.[19]

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[19] The Board recently announced the standards which will govern its exercise of jurisdiction in all future cases. Under these standards, announced in eight decisions of the Board, and summarized in a press release issued by the Board on October 6, 1950, the Board will exercise jurisdiction over:

1. Instrumentalities and channels of interstate and foreign commerce (for example, radio systems).
2. Public utility and transit systems.
3. Establishments which operate as integral parts of a multi-state enterprise (for example, chain stores, and branch divisions of national or interstate organizations).
4. Enterprises which produce or handle goods destined for out-of-state shipment, or performing services outside a state, if the goods or services are valued at $25,000 a year.
5. Enterprises which furnish services or materials necessary to the operation of enterprises falling into categories 1, 2 and 4 above, provided such goods or services are valued at $50,000 a year.
6. Any other enterprise which has:
   (a) a direct inflow of material valued at $500,000 a year; or
   (b) an indirect inflow of material valued at $1,000,000 a year; or
   (c) a combination inflow or outflow of goods which add up to at least a total of "100%" of the amounts required in items 4, 5, 6, (a) and (b) above.
7. Establishments substantially affecting national defense.

The instant case falls within category 3 of those standards. In Case No. 108, the Board probably would not in the present posture of the record in that case assert jurisdiction under its new standards. But this does not mean that enforcement of the Board's order in that case would have no practical significance. The order enjoins the union from exerting secondary economic pressure against Langer through any other person with whom he also does business. The operations of these other persons may, of course, in a particular case meet the jurisdictional criteria announced by the Board and any secondary strike pressure exerted through them against Langer would be violative of a decree enforcing the order.

It is asserted (Pet. Br. in *Langer* case, No. 108, this Term, p. 31) that the Board's policy decision not to exercise jurisdiction in cases involving relatively slight impact on commerce, gives rise to an anomalous result with respect to

III

THE BOARD'S ORDER DOES NOT IMPOSE INVOLUNTARY SERVITUDE

Petitioners assert (Br. 21-26) that if Section 8 (b) (4) (A) and the Board's order require the union's members to continue working on a project regardless of the presence of Watson's employees, the Act and the order infringe the constitutional privilege against involuntary servitude. The claim rests upon a misconception of the statutory provisions and the Board's order. The Act does not make it an unfair labor practice for employees to cease work for any purpose. The statute expressly safeguards the right of employees to quit work or to work on any terms which they themselves choose.[20] The limitations contained in Section 8

Section 303 (a) of the Act which gives private parties the right to sue for damages resulting from secondary boycotts in the Federal District courts. Under that section, it is argued, cases which are not deemed sufficiently close in their relationship to commerce to warrant exercise of the Board's jurisdiction might nevertheless be brought to the courts for decision. We fail to see how this result in any way requires the conclusion petitioner urges, that Congress did not intend to vest jurisdiction in the Board over such cases as the *Langer* case. Congress conferred upon the Board a broad discretion to effectuate the policies of the Act. In the exercise of this discretion the Board, for policy reasons, may properly decline to exert jurisdiction in cases where a district court in private litigation under Section 303 (a), having no similar discretion, may not decline to grant relief. The different result does not suggest a want of power in the Board, but merely that entirely different considerations may prevail in unfair labor practice proceedings before the Board than in private litigation in the courts.

[20] Section 502 of the Act provides:

"Sec. 502. Nothink in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to

(b) (4) (A) are imposed upon labor organizations and their agents and make it an unfair labor practice for them to engage in, or induce or encourage employees to engage in strike action for the stated object. The Board's findings and order are consistent with these limitations. The Board's findings that petitioners violated Section 8 (b) (4) (A) are predicated not upon the action of the union carpenters in refusing to work, but upon petitioners' action in bringing about that concerted refusal. The Board's order does not require any employees to return to work; it does not require that petitioners compel them to do so; it merely requires petitioners to revoke the strike order which keeps them from returning to work. Neither the Act, nor the Board's findings or order, therefore, impose involuntary servitude on petitioners or the employees. *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490; *International Union, U. A. W., A. F. of L., Local 232* v. *Wisconsin Employment Relations Board*, 336 U. S. 245, 251. Accord: *National Labor Relations Board* v. *Wine, Liquor & Distillery Workers Union, Local 1, etc., A. F. of L.*, 178 F. 2d 584, 587-588 (C. A. 2); *International Brotherhood of Electrical Workers, Local 501, et al.* v. *National Labor Relations Board*, 181 F. 2d 34, 39-40

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make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act."

(C. A. 2). Cf. *National Labor Relations Board* v. *National Maritime Union of America*, 175 F. 2d 686, 692 (C. A. 2), certiorari denied, 338 U. S. 954; *Printing Specialties & Paper Converters Union, Local 388, A. F. of L.* v. *LeBaron*, 171 F. 2d 331, 334-335 (C. A. 9); *United Brotherhood of Carpenters & Joiners of America* v. *Sperry*, 170 F. 2d 863, 868-869 (C. A. 10).

IV

THE BOARD'S ORDER IS NOT MOOT

Petitioners assert (Br. 66-68) that because all work on Stanley's residence has been completed, the Board's order is now moot. This argument is but another aspect of petitioners' fallacious contention, discussed above, that their illegal secondary boycott should be regarded as involving only the neutral parties against whom it is immediately directed, and not Watson, the real party whom the union by these illegal tactics sought to reach.

As long as the basic dispute between petitioners and Watson remains unresolved, and petitioners do not even claim that it has been resolved, the danger remains that petitioners will resort to secondary boycotts against others who do business with Watson, to compel Watson to yield to their demands (R. 34, 53). It is against this danger that the Board's order is designed to guard, and that order is not rendered superfluous or unnecessary merely because the specific violation found has been

discontinued by petitioners, either voluntarily or because the opportunity to continue it in precisely the same fashion or context has disappeared. Indeed, even if the specific dispute between petitioners and Watson were resolved the Board's order would not thereby be rendered moot. The danger that petitioners might resort to illegal secondary boycotts against Watson should another dispute arise between them in the future would suffice to sustain the order. For it was Congress' view that "neither the administrative body nor the courts are required to assume * * * that the unlawful practice in question, even though presently terminated, will not be resumed in the future. If such practice is resumed there will be immediately available to the Board an existing court decree to serve as a basis for contempt proceedings." H. Rep. No. 1371, 74th Cong., 1st Sess., p. 5 Cf. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271; *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217, 225; *National Labor Relations Board* v. *Pool Manufacturing Co.*, 339 U. S. 577, 581-582.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed and the Board's order enforced in full.

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FEBRUARY, 1951.

APPENDIX

The relevant provisions of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C. Supp. III, 141 et seq.) are as follows:

SEC. 101. * * *

"FINDINGS AND POLICIES

"SECTION 1. * * *

"Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

"DEFINITIONS

"SEC. 2. When used in this Act—

* * * * *

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

"UNFAIR LABOR PRACTICES

* * * * *

"SEC. 8. * * *

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in,

a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer * * * or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * * *Provided,* That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * * * *

"PREVENTION OF UNFAIR LABOR PRACTICES

"SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * * *

"LIMITATIONS

"SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

* * * * * *

EFFECTIVE DATE OF CERTAIN CHANGES

SEC. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto.

* * *

* * * * * *

SAVING PROVISION

SEC. 502. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.

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